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NO. 92-74

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1993

DEPARTMENT OF REVENUE OF THE STATE OF OREGON, RICHARD A. MUNN, in his Capacity as Director of the Department of Revenue of the State of Oregon,

Petitioner,

v.

ACF INDUSTRIES, INC.; GENERAL AMERICAN TRANSPORTATION CORPORATION; GENERAL ELECTRIC RAILCAR SERVICES CORPORATION; PULLMAN LEASING COMPANY; RAILBOX COMPANY RAILGON COMPANY; TRAILER TRAIN COMPANY; UNION TANK CAR COMPANY,

Respondents.

On Petition for a Writ of Certiorari From The United States Court of Appeal For the Ninth Circuit

AMICUS BRIEF OF THE STATE OF CALIFORNIA

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I.

QUESTION PRESENTED

In other litigation currently pending in the Ninth Circuit, California has fully developed on the record a challenge to the standing of ACF Industries, Inc., General American Transportation Corporation, and Union Tank Car Company to raise claims under section 306 of the Railroad Revitalization and Regulatory Reform Act. Should this Court now avoid any determination of the standing issue regarding these three specific parties which would bar an independent standing determination below in California's case?

II.

INTEREST OF AMICUS

The State of California files this brief for the limited purpose of calling this Court's attention to an appeal currently pending before the United States Court of Appeals for the Ninth Circuit (Court of Appeals Docket No. 93-15938, District Court Docket No. CV-92-02816-DLJ). A copy of the Notice of Appeal is included in the appendix as Exhibit A, a copy of the district court decision from which California's appeal is taken is included as Exhibit B.

California's concern is that this Court not assume that the standing issue has been resolved in relation to ACF Industries, Inc., General American Transportation Corporation and Union Tank Car Company, each of which is a respondent in these proceedings.

ARGUMENT

I.

THE STATUS OF THE STANDING ISSUE IN THE MATTER CURRENTLY PENDING BEFORE THIS COURT

A. The District Court Decision

In the District Court petitioner, Department of Revenue of the State of Oregon (DOR), raised the issue of respondents' standing to bring an action under the Railroad Revitalization and Regulatory Reform Act (the 4-R Act). But that challenge to respondents' standing, as construed by the District Court, treated all respondents (identified as "carlines") as being of the same nature. The challenge to the carlines as a group was based on DOR's statutory construction argument of the meaning of "any other tax" as that phrase is used in section 306(1)(d) of the 4-R Act.[1/] The District Court stated, "As the court discussed extensively in *Trailer Co. v. State Bd. of Equalization of North Dakota*, 710 F.2d 468, 471-73 (8th Cir. 1983), the close relationship between the railcar companies and the railroads results in discriminatory taxation against railroads when there is discriminatory taxation of railcar companies." The District Court Slip

1. Section 306(1)(a) prohibits assessments of rail transportation property at a higher ratio to its true value than other commercial and industrial property is assessed in relation to its true value. Section 306(1)(d) prohibits "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad . . . ."

Opinion is appendix Exhibit C. Slip Opinion at p. 9. The DOR did not raise, and thus the District Court did not consider, the differences in the nature of Trailer Train Company and ACF Industries, Inc., General American Transportation Corporation, and Union Tank Car Company (hereinafter sometimes referred to as the "three respondents").[2/] Because the DOR's standing argument was not based on the distinction between the three respondents and Trailer Train no evidentiary record was developed to highlight that distinction and the standing motion brought by DOR did not rely upon that distinction.

B. The Ninth Circuit Decision

As the Ninth Circuit decision in *ACF Industries v. Dept. of Revenue of State of Or.*, 961 F.2d 813 (9th Cir. 1992) notes in footnote 2 at page 817, "The DOR argued below that the Carlines do not have standing to sue under sections 306(1)(d) because they are not common carriers by railroad. The DOR has apparently abandoned that argument on appeal, focusing instead on its argument that section 306(1)(d) does not apply to exemptions." While it is not entirely clear that the Ninth Circuit's characterization of the DOR's argument in the District Court is consistent with the District Court's interpretation of that argument, it is manifest that the Ninth Circuit decision treats the standing issue as having been

2. Trailer Train Company has changed its name so that in the California litigation it is named TTX.

"abandoned".[3]/

While the Ninth Circuit decision goes on in footnote 2 at page 818 to state "In this case, we agree with the district court that the Carlines have standing." it does so without a factual record which establishes the distinctions between Trailer Train and the three respondents. Highlighting the failure to distinguish between the three respondents and Trailer Train is the court's statement in footnote 2 that "Reaching that very conclusion, the Eighth and Eleventh Circuits have emphasized 'the close relationship between [the Carlines] and common carriers, and [have] held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d).'" When that quote is compared with the original quote it can be seen that the bracketed phrase "[the Carlines]" in the original quote is actually "Trailer Train". *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1573 (11th Cir. 1987).

A reading of the district court opinion and the Ninth Circuit decision clearly illustrates that no attempt was made to distinguish between the characteristics of the three respondents and Trailer Train insofar as those characteristics relate to the standing of either Trailer Train or any of the three respondents to bring an action under § 306 of the 4-R Act.

The Ninth Circuit's footnoted discussion of standing fails to even mention, much less consider, the traditional tripartite test to be applied in evaluating standing. *Lujan v. Defenders of Wildlife*, __ U.S. __, 112 S.Ct. 2130 (1992).

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3. The District Court's description of DOR's standing argument appears at p. 6 of the Slip Opinion (Exhibit C).

II.

THE STANDING OF TRAILER TRAIN IS NOT CHALLENGED BY CALIFORNIA IN ITS NINTH CIRCUIT APPEAL

The issues raised by the DOR, in relation to which this Court has granted certiorari, are fully ripe for decision in spite of any standing defects which may exist in relation to the three respondents. While California has raised serious objections to the standing of the three respondents it has not done so in relation to Trailer Train. The standing of Trailer Train was the subject of a decision which established the special nature and relationship of Trailer Train to the various railroads which actually own that company. *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983). The nature of Trailer Train was also established in the District Court trial which led to the Ninth Circuit appeal cited in the Interest of Amicus section of this brief. California has accepted that decision and has not challenged the standing of Trailer Train in either the District Court or in the Ninth Circuit. Thus, whether or not the three respondents have standing, all of the legal issues presented by the DOR remain ripe for decision by this Court in relation to Trailer Train.

III.

CALIFORNIA HAS RAISED SERIOUS ISSUES IN RELATION TO THE STANDING OF THE THREE RESPONDENTS

As the District Court decision in California's case (Appendix Exhibit B) shows, California's challenge to the standing of the three respondents was based on both a Motion to Dismiss and a Summary Judgment Motion. While the Motion to Dismiss necessarily was based on a lack of factual allegations to support the standing of the three respondents the Summary Judgment Motion was supported by evidentiary matter.

The District Court record contains not only evidentiary material regarding the nature of the three respondents but also declarations of expert witnesses regarding the effect of enjoining collection of property taxes from the three respondents; that is, would the economic benefit of such an injunction ultimately rest with the three respondents, the shippers whose materials are carried in the respondents' cars, or the railroads. A copy of the Points and Authorities in support of California's motion is included in the Appendix as Exhibit D.[4/]

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4. Briefly stated California has agreed that because Trailer Train is wholly owned by railroads it charges the railroads the minimum possible amount. If a profit is made it is distributed to the railroads which own Trailer Train. Any economic burden created by taxes thus, necessarily is passed on to railroads.

In contrast, the three respondents are privately (non-railroad) owned companies. The evidentiary record in the California case contains testimony of expert witnesses showing that because of the non-railroad ownership it is impossible to prove that all of the elements of standing are present in relation to the three respondents.

In short, California has made a very serious, very well supported attack on the standing of the three respondents.

IV.

WHILE THE STANDING ISSUE HAS BEEN IMPROPERLY ASSUMED IN SEVERAL LOWER COURT DECISIONS IT HAS NOT BEEN DECIDED ON A PROPER RECORD

As this Court held in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1983):

> "These cases thus did not directly confront the question before us. '[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us.' *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5, 94 S. Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974). We therefore view the question as an open one."

In its Points and Authorities filed with the District Court in support of the Motions to Dismiss or for Summary Judgment (Appendix Exhibit D) California developed at length the manner in which some courts have concluded that all "Carlines" are protected by the 4-R Act and the faulty analysis which led to this conclusion based on the earlier holdings that Trailer Train was so protected. None

of those holdings should be allowed to control when the Court is finally presented with a proper factual record in relation to the nature of the three respondents and the distinctions between them and Trailer Train.

CONCLUSION

By filing this brief California attempts to fulfill the proper role of an amicus by bringing to this Court's attention a pertinent matter not raised by other briefs.[5/] California realizes that certiorari was not granted to consider the standing of the three respondents; nevertheless, because decisions refer to the standing of the parties to bring an action, California feels it appropriate to call the particular problems presented by the present case to the Court's attention. California respectfully requests that this Court make no standing determination regarding ACF Industries Inc, General American

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5. The Brief for the United States as Amicus Curiae states in footnote 11 at page 6:

> "11Petitioner confirms that it no longer challenges respondents' standing under Subsection (b)(4). The petition states that the question of standing "may be considered settled for purposes of review at this level" (Pet. 5 n.5). By this, we take it that petitioner now concedes that, if the State's tax would violate Subsection (b)(4) with respect to rail cars owned by a rail carrier, the State's tax also could not be applied to the rail cars owned by the respondents in this case."

It is precisely this concession that California does not make in relation to the three respondents.

That brief and other briefs filed in this matter fail to distinguish between Trailer Train and the three respondents.

Transportation Corperation, or Union Tank Car Company which would bar an independent standing determination in California's case now pending in the Ninth Circuit.

DATED: July 15, 1993

Respectfully submitted,

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APPENDIX

EXHIBIT A

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UNITED STATES DISTRICT COURT FOR THE NORTHERN

DISTRICT OF CALIFORNIA

ACF INDUSTRIES INCORPORATED, GENERAL AMERICAN TRANSPORTATION CORPORATION, RAILBOX COMPANY, RAILGON COMPANY, TTX COMPANY, AND UNION TANK CAR COMPANY, Plaintiffs, v. CALIFORNIA STATE BOARD OF EQUALIZATION, Defendant.	NO. C92 2816 DLJ NOTICE OF APPEAL

Notice is hereby given that the California State Board of Equalization hereby appeals to the United States Court of Appeals for the Ninth Circuit from the Order of this Court filed April 19, 1993, which denied defendant's motion: (1) to dismiss the complaint or in the alternative to dismiss each cause of action independently on the basis that this court was without jurisdiction to have issued its

injunction enjoining collection of taxes from plaintiffs as prayed for in the complaint; (2) for summary judgment to the complaint or in the alternative as to each cause of action independently on the basis that this Court was without jurisdiction to have enjoined the collection of taxes from plaintiffs as prayed for in the complaint; and (3) to modify the preliminary injunction enjoining collection of taxes from these plaintiffs.

DATED: May 17, 1993

DANIEL E. LUNGREN, Attorney General
of the State of California

/s/
ROBERT E. MURPHY
Deputy Attorney General

Attorneys for Defendant
California State Board of Equalization

EXHIBIT B

ACF INDUSTRIES, et al.,	)	
	)	
Plaintiffs,	)	Case No.
	)	C-89-3449-DLJ
v.	)	
	)	
STATE BOARD OF EQUALIZATION,	)	
	)	ORDER
Defendant.	)	
	)	
	)	

On March 24, 1993, the Court heard defendant's motion to dismiss, defendant's motion for summary judgment, and defendant's motion to modify preliminary injunction. James McBride of Laughlin, Halle, McBride, Lunsford & Fletcher and Fielding Lane of Thelan, Marrin, Johnson & Bridges appeared on behalf of plaintiffs ACF Industries, General American Transportation Corp., and Union Tank Car Co. Robert Murphy of the State Attorney General's Office appeared on behalf of defendant State Board of Equalization. Having considered the papers submitted, the applicable law, the arguments of counsel, and the entire record herein, the Court hereby DENIES defendant's motion to dismiss, defendant's motion for summary judgment, and defendant's motion to modify preliminary injunction for the following reasons.

BACKGROUND

In 1976, Congress passed the Railroad Revitalization and Regulatory Reform Act, Pub. L. No. 94-210, 90 Stat. 54 (1976) (codified at 49 U.S.C. § 11503 et seq.), commonly known as the "4-R Act." Section 306 of the 4-R Act, 49 U.S.C. § 11503, prohibits discriminatory

state taxation of railroads. This provision states, in relevant part, that a state may not

> assess rail transportation property at a value that has a higher ratio to the true market value of the rail transportation property than the ratio that the assessed value of other commercial and industrial property in the same assessment jurisdiction has to the true market value of the other commercial and industrial property.

49 U.S.C.A. § 11503(b)(1) (West 1992).

This action involves a challenge to California's taxation scheme for rail transportation property. Plaintiffs ACF Industries, Inc., General American Transportation Corp., Railbox Co., Railgon Co., Trailer Train Co., and Union Tank Car Co. (collective referred to as "the Carlines"), are all private carline leasing companies in the business of leasing rail cars to non-railroad commercial companies. They allege that defendant State Board of Equalization ("the Board") has denied them tax exemptions given to other commercial and industrial property owners and has appraised their rail transportation property at a level which overstates the true market value of the property.

Specifically, Count I of the Complaint alleges that California's scheme of exempting various forms of commercial and industrial property while imposing an ad valorem property tax on plaintiffs was discriminatory under § 306(1)(d). Counts II and III of the Complaint seek relief under § 306(1)(a) for discrimination resulting from the assessment of their rail transportation property at a

ratio of true market value which exceeds the ratio of assessment of value for all other taxable commercial and industrial property in the state.

Defendant responds that even though plaintiffs' railroad cars fall within the literal definition of rail transportation property, such cars are not rail transportation property, and thus plaintiffs are not protected by § 306(1)(a).

Plaintiffs base jurisdiction on §306(2) of the 4-R Act, 28 U.S.C. § 1337, which confers original jurisdiction on the District Courts in relation to acts of Congress regulating commerce, and 28 U.S.C. § 1331, which confers original jurisdiction on District Courts for cases brought under the United States Constitution, laws or treaties. Defendant argues that the Court lacks 4-R jurisdiction because of the nature of plaintiffs and the manner in which their business is conducted. Defendant also contends that neither 28 U.S.C. § 1337 nor 28 U.S.C. § 1331 can confer jurisdiction in light of the Tax Anti-Injunction Act, 28 U.S.C. § 1341.

On February 24, 1993, defendant moved the Court to dismiss this action for want of subject matter jurisdiction as to the three plaintiffs. Alternatively, defendant moved for summary judgment as to the entire complaint. Finally, if the Court determines that it does have jurisdiction and denies the motion for summary judgment, defendant seeks modification of the stipulated preliminary injunction of November 23, 1992. Defendant's motions do not address plaintiffs Railbox Company, Railgon Company and TTX Company. Thus, the stipulated preliminary injunction which enjoined each of these plaintiffs' 1992 personal property ad valorem tax

payments remains in effect.

ANALYSIS

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Defendant's motion to dismiss is based upon the argument that § 306 is inapplicable to carlines such as plaintiffs ACF Industries, GATC, and Union Tank because (1) they are not common carriers by rail, railroads or Trailer Trains and (2) they have little or no relationship with the railroad industry. Plaintiffs therefore have no standing under § 306.

Section 306(1)(d) prohibits the Board from imposing "any other tax which results in discriminatory treatment of a common carrier by railroad subject to [the Interstate Commerce Act]." Under § 306(1)(a), the subject of protection is "rail transportation property." "Rail transportation property" is defined as:

> all property and other assets, irrespective of ownership, that comprises the entire operating unit devoted to rail transportation service.

49 CFR § 1201(ii)(30).

The Ninth Circuit's decision in ACF Industries, Inc. v. Department of Revenue of the State of Oregon, 961 F.2d 813 (9th Cir. 1992) ("ACF Oregon"), is relevant to this Court's determination of plaintiff's standing under § 306. In ACF Oregon, the Court considered the same

plaintiffs, ACF Industries, General American Transportation Corp., and Union Tank. The Carlines sought declaratory and injunctive relief against defendant's assessment and collection of the Carlines' personal property tax for 1988, alleging discriminatory taxation in violation of the 4-R Act. Specifically, the Carlines claimed that Oregon's taxation of railroad property was discriminatory because "a large majority of non-railroad business personal property is not taxed" while railroad property is taxed in full." ACF Oregon, 961 F.2d at 817. The Ninth Circuit reversed and remanded the district court's decision denying the Carlines' challenge.

On question of plaintiff's standing under § 306, the Ninth Circuit expressly stated "that, although the Carlines had standing to bring an action under section 306(1)(d), Oregon's exemption scheme constituted neither de jure nor de facto discrimination against the Carlines." ACF Oregon, 961 F.2d at 817 (emphasis added). The Court went on to explain:

> The DOR argued below that the Carlines do not have standing to sue under section 306(1)(d) because they are not common carriers by railroad. The DOR has apparently abandoned that argument on appeal, focusing instead on its argument that section 306(1)(d) does not apply to exemptions. Although we have not specifically decided whether entities other than railroads have standing to challenge a state tax under section 306, we have considered such challenges without discussing the standing question. In this case, we agree with the district court that the Carlines have

standing.

Section 306(1)(d) prohibits any tax that results in discriminatory treatment of a common carrier by railroad, even if the effect is indirect. Without a doubt, if Oregon's tax exemption scheme discriminates against the Carlines, it also "results" in discrimination against the railroads. Reaching that very conclusion, the Eighth and Eleventh Circuits have emphasized "the close relationship between [the carlines] and common carriers, and [have] held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d). In any event, the required analysis under 306(1)(d) could show an effect on private carlines which directly and integrally impacts on common carriers by railroad." . . . Trailer Train Co. v. State Bd. of Equalization, 710 F.2d 468, 471-73 (8th Cir. 1983) ("[B]ecause tax discrimination against the Carlines' railroad cars adversely affects common carriers by railroad directly and immediately as tax discrimination against the railroad cars of the carriers themselves, and because section 306(1)(d) prohibits any state tax which results in discriminatory treatment of a common carrier by railroad,' the plain language of the statute supports the district court's holding that [the Carlines have standing.]").

ACF Oregon, 961 F.2d at 817 n.2 (citations omitted). Although the Ninth Circuit did not hear argument on plaintiff's standing directly, because defendant had

abandoned their argument that plaintiffs were not common carriers by railroad on appeal, the Ninth Circuit did review the finding of the district court and expressly held that plaintiffs ACF, GATC and Union tank have standing under § 306. The circuit court remanded the case to the district court to enjoin defendant's collection of the ad valorem tax on the carlines' property.

The Court finds the Ninth Circuit's holding in ACF Oregon controlling in this case, and accordingly, DENIES defendant's motion to dismiss based on lack of standing.

B. Motion for Summary Judgment.

Defendant argues that § 306 was intended to cover "discriminatory treatment of a common carrier by railroad." "Discrimination" requires:

(1) that the entity being discriminated against is a member of a class possessing a particular legal or legislatively defined characteristic ("the protected class");

(2) that there is some law, act, or practice that causes disparate treatment of the protected class compared to others similarly situated with respect to the purpose of the law, act, or practice ("the classification"), and, most importantly;

(3) that, as the result of the classification, he or she has suffered an unfair or unreasonable burden, impact, or deprivation of a right.

In this case, the protected class is "common carrier(s) by railroad subject to this part," according to § 306(1)(d).

In Lujan v. Defenders of Wildlife, 112 S. Ct. 2130 (1992), the Supreme Court set forth the standards that must be met for a district court to have jurisdiction. the Supreme Court stated plaintiffs have the burden of proving (1) that they have suffered an injury in fact, the invasion of a legally protected interest which is concrete and particularized, (2) that there was a causal relationship between the injury and the conduct complained of, and (3) that it is likely that a favorable decision will redress the injury. Lujan 112 S. Ct. at 2136.

In particular, to satisfy the first factor, plaintiffs must show that they have suffered an injury created by § 306(1)(d), that is, that (1) they are common carriers by railroad or (2) they are sufficiently close to such a common carrier by railroad that any economic injury to them is also an injury to a railroad. This is similar to defendant's argument in favor of it motion to dismiss.

Plaintiffs have shown that there is a sufficiently close relationship between the Carlines and common carriers by railroad that any economic injury to the Carlines is also an injury to a railroad. While it is true that the Carlines and Trailer Train operate differently, the cars of each company are part of a national freight car pool which is used to transport goods and on which the railroads ultimately pay the cost of ownership, including any discriminatory taxes.

As a result of the Interstate Commerce Act of 1887 (the Act), railroads are required by law to maintain an adequate number of cars. Thus, private car companies such as the plaintiffs have developed. Private car

companies provide cars to shippers who in turn provide cars to the railroads. The development of private car companies, however, does not absolve the railroads of their obligation to provide shippers with cars. If the railroads were unable to fulfill their obligation, and as a result a shipper provided the necessary car to the railroad, the Act required the railroads to pay a fee to the shippers for the use of the car. The Interstate Commerce Commission (the ICC) has jurisdiction to regulate the railroads' use of the cars owned by private carlines, including prescribing the amounts that the railroads pay for the use of the cars. The requirement that railroads pay Carlines the cost of ownership of these cars insures that discriminatory taxes are passed through to the railroads.

Regarding the third factor, the redress of injury, defendant argues that enjoining the collection of any ad valorem taxes from plaintiffs will not redress any injury; instead, it will produce an unwarranted windfall for plaintiffs. Plaintiffs, in turn, submit that the injury in this case is "discriminatory and excessive ad valorem taxes which, absent a federal injunction, these Carlines will be compelled to pay." Plaintiffs' Opposition at 7. The Court agrees with plaintiffs that such "palpable economic injury" is unquestionably a sufficient basis for standing. Sierra Club v. Morton, 405 U.S. 727, 734 (1972). The Court finds that at a minimum, there are no genuine issues of material fact in dispute on this issue of redress of the injury that warrant denying summary judgment at this stage.

Plaintiffs have also brought forth sufficient evidence of the second factor -- a causal relationship

between the injury and the conduct complained of -- to justify denying defendant's motion for summary judgment. The allegations of the Board's conduct, i.e., its overvaluation of the Carlines' property, its failure to equalize the assessments of the Carlines' property, and its imposition of a property tax on the Carlines where other commercial and industrial property is exempt, if true, all contributed to the economic injury suffered. Because defendant has failed to show that there are no genuine issues of material fact in dispute regarding plaintiffs' claims, the Court DENIES defendant's motion for summary judgment.

C. Motion to Modify Preliminary Injunction.

For the reason addressed above, the Court also DENIES defendant's motion to modify the preliminary injunction.

CONCLUSIONS

For the foregoing reasons, the Court ORDERS as follows:

1. Defendant's motion to dismiss is DENIED;
2. Defendant's motion for summary judgment is DENIED;

3. Defendant's motion to modify the preliminary injunction is DENIED.

IT IS SO ORDERED.

Dated: April 19, 1993.

/s/
D. Lowell Jensen
United States District Judge

EXHIBIT C

IN THE UNITED STATES DISTRICT

COURT FOR THE DISTRICT OF OREGON

ACF INDUSTRIES INCORPORATED, GENERAL AMERICAN TRANSPORTATION CORPORATION, GENERAL ELECTRIC RAILCAR SERVICES CORPORATION, PULLMAN LEASING COMPANY, RAILBOX COMPANY, RAILGON COMPANY, TRAILER TRAIN COMPANY, and UNION TANK CAR COMPANY, Plaintiffs, v. DEPARTMENT OF REVENUE OF THE STATE OF OREGON, and RICHARD A. MUNN, in his capacity as Director of the Department of Revenue of the State of Oregon, Defendants.	CV No. 88-1169-PA OPINION

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PANNER, J.

Plaintiffs (Carlines)[1/] bring this action against defendants Oregon Department of Revenue and its Director, Richard Munn (collectively "Department"). They seek declaratory and injunctive relief against the Department's assessment and collection of Carlines' Oregon personal property taxes for the tax year 1988.

The parties agreed that there are no material facts at issue and this case would be tried to the court based on fact stipulations, briefing on the legal issues, and argument. After argument, Department moved to supplement the record. I grant Department's motion to supplement the record (#46).

I find for Department. Below are my findings of fact and conclusion of law as required by Fed. R. Civ. P. 52(a).

BACKGROUND

I. Carlines

Carlines are a group of eight railcar companies. They purchase or lease railcars and furnish them to common carrier railroads for transporting freight. Carlines

1. The plaintiffs are: ACF Industries Inc., General America Transportation Corp., General electric Railcar Services Corp., Pullman Leasing Company, Railbox Company, Railgon Company, Trailer Train Company and Union Tank Car Company.

also furnish railcars directly to shippers. Carlines pay state taxes and pass the costs on the railroads through user charges.

Carlines have strong economic ties to railroad companies. For example, all the shareholders of plaintiff Trailer Train Inc. are railroads. Carlines have various mixes of customer types. For example, GATX Inc. leases 99% of its fleet to shippers and 1% to railroads. The percentages are the reverse for Union Tank Car Company Inc. Some plaintiffs are wholly-owned subsidiaries of others.

II. The Oregon Property Taxation System

Under ORS 307.030, all tangible personal property in the state is subject to property tax unless it is expressly exempt. Taxes are assessed on 100% of true cash value. ORS 308.250. The average tax rate for 1988 is 2.489% of true cash value.

The following are examples of property expressly exempt from property taxation: agricultural machinery and equipment, business inventories, and agricultural products in the possession of farmers. ORS 307.0404 et seq.. Motor vehicles are exempt from personal property taxation but are subject to fixed motor vehicle registration fees in lieu of property taxes. ORS 803.585. Standing timber is real property under Oregon law. ORS 307.010(1). It is taxed at harvest. ORS 321.005 et seq.

As of January 1, 1988, the market values of taxed and untaxed personal commercial and industrial property, motor vehicles, and standing timber in Oregon were as follows:

		Value $ (billions)	% of Total
1.	Taxed tangible personal commercial and industrial property, excluding motor vehicles and standing timber	4.8	18.4
2.	Motor Vehicles	1.5	5.8
3.	Standing Timber	11.6	44.0
4.	Exempt	8.2	31.4
5.	Total	26.1	100.0

III. The Railroad Revitalization and Regulatory Reform Act

The parties stipulated that § 306 of the Railroad Revitalization and Regulatory Reform Act of 1976 (4R Act), Pub. L. No. 94-210, 90 Stat. 54, as codified, controls this action. Section 306 is codified at 49 U.S.C. § 11503. Section 306(1) provides:

> (1) Notwithstanding the provisions of 202(b), any action described in this subsection is . . .unreasonable and unjust discrimination against and an undue burden on interstate commerce. It is unlawful for a State, a political subdivision of a State, or a governmental entity or person acting on behalf of such State or subdivision to commit any of the following prohibited acts:
>
> > (a) The assessment (but only to the extent of any portion based on excessive values as hereinafter described) for purposes of a property tax levied by any taxing district, of transportation property at a value which bears a higher ratio to the true market value of such transportation property than the ratio which the assessed value of all other commercial and industrial property in the same assessment jurisdiction bears to the true market value of all such other commercial and industrial property.
> >
> > (b) The levy or collection of any tax on an assessment which is unlawful under subdivision (a).
> >
> > (c) The levy or collection of any ad valorem property tax on transportation property at a tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction.
> >
> > (d) The imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part.

(Emphasis supplied.) Under § 306(2), the district court has jurisdiction to enjoin substantive violations of § 306.

Paragraph (3)(c) of § 306 defines "commercial and industrial property" or "all other commercial and industrial property" as:

> all property, real or personal, other than transportation property and land used primarily for agricultural purposes or primarily for the purpose of growing timber, which is devoted to a commercial or industrial use and which is subject to a property tax levy . . . .

(Emphasis supplied). The parties agree that Carlines' property involved in this action is "transportation property" under § 306. The legislative history of the 4R Act, and its predecessors, spans about fifteen years. The goal of the 4R Act was to "eliminate the long-standing burden on interstate commerce resulting from discriminatory State

and local taxation of common and contract carrier transportation property." S. Rep. No. 1483, 9th Cong., 2d Sess. 1 (1968), accompanying S. 927 and S.Rep.No. 91-630, 91st Cong., 1st Sess. 1 (1969).

The parties dispute whether legislative history should be used to interpret § 306, and if so, what that history shows about legislative intent. As often is the case, the legislative history shows a long, bitter battle among various interested groups. The only thing it clearly shows is the intent to compromise.

DISCUSSION

I. Standing

Carlines assert standing under § 306(1)(d). They rely on the § (1)(d) language prohibiting any other tax which "results in discriminatory treatment of a common carrier by railroad." (emphasis supplied.) Carlines contend that this provision grants standing to parties challenging taxes that have a discriminatory effect on railroads, even if the effect is indirect.[2/] Department disputes Carlines' standing. It argues that this action concerns a challenge to property taxes, the subject of § 306(1)(c), not § 306(1)(d), which concerns any other tax. Therefore, Department reasons, the broad language of § (1)(d) does not apply in a challenge to property taxes.

The case law supports both positions. Although no case is binding or on all fours with this case, some of the reasoning is helpful.[3/] For example, in Trailer Train

2. Naturally, such challenges must meet the traditional "case or controversy" requirements of Article III of the United States Constitution, and show injury and causation. Duke Power Co. v. Carlino Environmental Study Group, 438 U.S. 59, 72 (1978). However, there is no dispute about those requirements here.

3. I am persuaded by Department's eleven-line footnote with citations to authority, that "[o]ut-of-circuit holdings are not binding upon courts within this circuit." Defendants' response Brief at 10 n.2.

Co. v. State Board of Equalization, 538 F. Supp. 509 (N.D. Cal. 1982) (Trailer Train California), the district court considered whether a business inventory property tax exemption that does not apply to railcar companies violates § 306(1)(a). That case presented the question whether § 306(1)(d) applies to railcar companies.

The Trailer Train California court held that railcar companies do not have standing under § (1)(d) because it read § (1)(d) as a prohibition against "discriminatory treatment" only of railroads. 538 F.Supp at 513. The court construed this as an "unequivocal limitation" of standing to common carriers by railroad. Id.

Other courts have held that § (1)(d) challenges are not limited to direct taxes on railroads. See, e.g., Department of Revenue v. Trailer Train Co., 830 F.2d 1567 (11th Cir. 1987); Trailer Train v. Bair, 765 F.2d 744 (8th Cir.), cert. denied, 474 U.S. 1021 (1985) (citing Trailer Train v. State Board of Equalization, 710 F.2d 468, 471-73 (8th Cir. 1983)); c.f. General American Transportation Corp. v. Louisiana Tax Commissioner, 680 F.2d 400 (5th Cir. 1982). These courts analyzed the question as one of legislative intent. They relied on the broad purpose of the 4R Act to eliminate the burden on interstate commerce resulting from discriminatory taxation of railroad transportation property.

The Ninth Circuit has not directly addressed standing under § (1)(d). However, in Trailer Train v. State Board of Equalization, 697 F.2d 860 (9th Cir.), cert. denied, 464 U.S. 846 (1983), the circuit took a broad, legislative intent-based approach to a discriminatory railroad taxation question under §§ (1)(a)-(c). There, the court said that a statute should not be interpreted so narrowly as to defeat its obvious intent. 697 F.2d at 865. I agree.

I find reasoning of the Fifth, Eighth and Eleventh

Circuits more persuasive than Trailer Train California. The law in those circuits is analytically consistent with the Ninth Circuit. The 4R Act prohibits taxation that results in discriminatory treatment of railroads.

The Trailer Train California court notes that Congress could have removed the restrictive language "common carrier by railroad" if it intended to extend standing to railcar companies. 538 F.Supp at 513. Congress could just as easily have removed the words "results in" if it wanted to limit standing to railroads.

The obvious intent of § 306, taken as a whole, is to prohibit states and local governments from imposing discriminatory taxes on railroads. As the court discussed extensively in Trailer Train Company v. State Board of Equalization of North Dakota, 710 F.2d 468, 471-73 (8th Cir. 1983), the close relationship between the railcar companies and railroads results in discriminatory taxation against railroads when there is discriminatory taxation of railcar companies.

As Department argues, taking this approach to the extreme could produce absurd results. If any company that furnishes products to the railroad industry asserted standing under §(1)d), there would be almost no limit to standing. Congress certainly could not have intended that. However, given the undisputed close connections between Carlines and the railroad industry, I need not consider that problem. Carlines have standing.

II. Challenge to the Oregon Property Tax System

The parties offer a vast array of options for deciding this case. They urge me to consider a variety of interpretations of § 306. This case appears to be one small part of a national litigation plan. I have no doubt that Congress or the Supreme Court will soon have a turn at grappling with § 306.

There are two possible types of discrimination under § 306, de jure and de facto, for lack of better

terms. I address each in turn.

A. There is no de jure discrimination.

In examining whether there is de jure discrimination, I rely on two elements of § 306. First, § 306(1)(a) prohibits assessment of transportation property at a value which is higher in relation to its true market value, than that ratio for all other commercial and industrial property. That language means that a state cannot, for example, assess Carlines' property at 100% of its true market value, while assessing all other commercial and industrial property at less than 100% of its true market value.

Second, § 306(1)(c) prohibits taxing transportation property at a tax rate higher than the rate applied to all other commercial and industrial property. This means that a state cannot, for example, tax Carlines' property at 10% of its assessed value while taxing all other commercial and industrial property at less than 10% of its assessed value.

Oregon does not commit either of these discriminatory acts. All personal property is assessed at 100% of its true market value and is taxed at the same rate. There is no de jure discrimination.

B. There is no de facto discrimination.

The question of de facto discrimination is more difficult. Courts have danced around the possibility of de facto discrimination under § 306. Presumably, they recognize how easily a state could evade the clear intent of § 306 by having a facially non-discriminatory tax, but exempting all taxpayers except railroads.

The court raised the specter of de facto discrimination in dicta in Clinchfield R. Co. v. Lynch, 784 F.2d 545, 552 (4th Cir. 1986). There, North Carolina taxed stored tobacco at 60% of its fair market value, lower than the rate for other property. The court held

that the trial court was correct in considering the differential tax rate as a factor in determining whether there was impermissible discrimination, saying:

> Certainly, the 4R Act does not encroach upon the State's right to tax its citizens as it sees fit, as long as the tax does not discriminate against railroads. The problem . . .[with the North Carolina scheme] is not that it grants tax breaks for certain agricultural products. But the problem is that if states are allowed to grant tax reductions to an increasing number of property items without taking into account the effect on the taxation of railroad property, the antidiscriminatory spirit and intent of § 306 would be swallowed up in the exceptions.

784. F.2d at 552.

In ACF Industries Inc. v. State of Ariz., 714 F.2d 93, 94 (9th Cir. 1983), the Ninth Circuit considered the possibility of de facto discrimination even more obliquely. The court rejected the argument that under § 306, the State of Arizona ought to include business inventories as commercial property. Arizona categorically exempted business inventories from ad valorem taxes. The court's rejection of this argument was cryptic. It said only that it has "nothing to commend it but a careful lawyer's desire to leave no possible theory unexplored." The court found no authority requiring untaxed property to be included in an average of assessed value for taxed property.

Trailer Train California is perhaps the most direct stab at the issue of de facto discrimination under § 306, but is still not especially helpful. There, the court rejected the argument that exempting business inventories from taxation discriminates against railroads, for two reason. First, the court read § 306 to require that the comparison class of property be property that is subject to a property

tax levy, which by definition the exempt property is not. 538 F. Supp. at 512. This is tautological reasoning that could result in precisely the problem raised in Clinchfield.

More significantly, the court found no evidence that the business inventory exemptions were discriminatory against transportation property. The court found no evidence of differential treatment of taxpayers with respect to the assessment ratio or the tax rate. Rather, it was a case of an exemption for a class of property which the plaintiffs do not own. The court characterized the plaintiffs' argument as equivalent to a person with no taxable income arguing that deductions for charitable contributions favor the wealthy. 538 F.Supp at 512. n.5.

In so holding, the court considered the policy reasons behind the business inventory exemption. The exemption was designed to eliminate the incentive for businesses to hold their inventories outside of the state. The court declined to find "backdoor" discrimination, noting that the exemption was neutral in application, and not directed against any particular class of taxpayer. Id. at 512. The court was careful to distinguish Ogilvie v. State Board of Equalization, 657 F.2d 204 (8th Cir. 1981), where personal property exemptions for certain types of property were avilable for particular types of taxpayers, but not railroads. Id. at 512 n.5.

This case amounts to a request that I examine the personal property tax exemptions in the Oregon tax system to determine whether the exemption scheme is discriminatory.

Carlines' claim rests in large part on the argument that Department violates § 306(d) by exempting standing timber from property taxes.[4/] This is conceptually the

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4. Carlines contend that some of the discriminatory effect of the property tax system comes through underreporting of taxable property. Department agrees that there is underreporting, but contends that the taxpayers are responsible for it and the State of Oregon does what it can to enforce reporting requirements. I agree that underreporting is not prohibited under § 306.

same type of argument that Clinchfield rejected, although in Clinchfield, the issue was tax rates, not exemptions. The value of standing timber demonstrates why it is so important to Carlines's argument to label standing timber "exempt".[5/] If standing timber and motor vehicles are "exempt", the percentage of exempt property would be 81.6%. Excluding motor vehicles reduces that to 75.8%.

If standing timber and motor vehicles are "subject to property tax", the percentage of exempt property is 31.4%. Excluding motor vehicles increases that to 38.2%. Neither party has provided, and I have found no bright line between a discriminatory and non-discriminatory percentage of exemption. Based on cases that have addressed the issue of what percentage exemption is discriminatory, I would have to conclude that the with- and without-standing timber figures straddle that line. For two reasons, I do no consider standing timber as exempt.

First, standing timber is taxed under an elaborate plan, which produces significant revenue for Oregon. Just because the tax is another way, does not mean that standing timber is not taxed. There is no evidence that Oregon timber owners benefit from the tax system at the expense of Carlines. Second, as in Trailer Train California, I find no reason to conclude there is "backdoor" discrimination in the exemption scheme. The scheme is neutral in application and there is no evidence that Oregon's tax system lacks an independently valid

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Carlines also contend that undervaluation of taxable property has a discriminatory effect. Undervaluation can be an element of underassessment under § (1)(a). Burlington No. v. Oklahoma Tax Comm'n, 481 U.S. 454 (1987). Department concedes undervaluation. However, Carlines have made no showing that undervaluation discriminates against them or that their property is not undervalued along with everyone else's.

5. To a lesser degree, Carlines rely on the motor vehicle exemption.

purpose.

If I assume that there is some percentage level of exemption that would be impermissibly discriminatory I do not find such discrimination here, based on the above conclusions. In Burlington Northern v. Bair, 584 F.Supp 1229, 1237-38 (S.D. Iowa 1984), aff'd in relevant part, 766 F.2d 1222 (8th Cir. 1985) (other subsequent history omitted), the court found a 50% exemption impermissibly discriminatory. In Trailer Train v. Leuenberger, No. 87-L-29 (D.Neb. Filed Dec. 11, 1987), aff'd 885 F.2d 415 (8th Cir. 1988), the court found a 75% exemption impermissibly discriminatory.

I have found no cases, and Carlines have cited none, in which a court has found an exemption of approximately 30% impermissibly discriminatory. The burden is on Carlines to show impermissible discrimination. Carlines have not met that burden.

CONCLUSION

I grant Department's motion to supplement the record (#46). Carlines have standing to bring this action. Carlines have not met the burden of showing that the Oregon property taxation system is impermissibly discriminatory under § 306 of the 4R Act. I grant judgment for Department.

DATED this 22 day of January, 1990.

/s/
OWEN M. PANNER
United States District Judge

EXHIBIT D

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UNITED STATES DISTRICT COURT FOR THE

NORTHERN DISTRICT OF CALIFORNIA

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INTRODUCTION

In their most recent action plaintiffs have sought alternative forms of relief asking either that defendant be enjoined from collecting any ad valorem taxes at all on plaintiffs' railroad cars or that, in the alternative, plaintiffs

be preliminarily enjoined from assessing cars at more than 59.6% of the values assigned to those cars by plaintiffs' expert.

Defendant first moves this court to dismiss this action for want of subject matter jurisdiction. By this motion defendant seeks to resolve an issue not yet decided in the Ninth Circuit, or indeed in any Circuit in this country. While jurisdiction has been assumed in the past the propriety of jurisdiction in relation to the three plaintiffs which are the subject of this motion is an open question.

In the event this court decides that it does have jurisdiction to hear this matter defendant moves for summary judgment as to the entire complaint based on the Points and Authorities and declarations submitted herewith. Finally, if the court determines that it does have jurisdiction and denies the motion for summary judgment defendant nevertheless seeks modification of the preliminary injunction issued in this matter.

Plaintiffs bring this action pursuant to § 306 of the Railroad Revitalization and Regulatory Reform Act (the 4-R Act). Complaint paras. 13-18, 26, 39.

Plaintiffs base jurisdiction on § 306(2) of the 4-R Act, 28 U.S.C. 1337 (which confers original jurisdiction on the District Courts in relation to acts of Congress regulating commerce); and 28 U.S.C. 1331 (which confers original jurisdiction on District Courts for cases brought under the United States Constitution, laws or treaties). Defendant contend that this court is without 4-R Act jurisdiction because of the nature of plaintiffs and the manner in which their business is conducted, and that neither 28 U.S.C. 1337 nor 28 U.S.C. 1331 can confer jurisdiction in light of the Tax Anti-Injunction Act, 28 U.S.C. 1341.

Defendant will show that plaintiffs are without standing to bring this action and thus this Court is without jurisdiction to hear any of plaintiffs' claims. But even if

it is determined that there is jurisdiction each of plaintiffs claims must fail.

Plaintiffs cause of action based on § 306(1)(a) is based on its allegation that defendant assesses its rail transportation property at a higher percentage of its true value than other commercial and industrial property in California is assessed in relation to its true market value. Defendant will show that even though plaintiffs' railroad cars fall within the literal definition of rail transportation property when § 306(1)(a) is properly construed in light of Congressional intent such cars are not rail transportation property and thus plaintiffs are not protected by § 306(1)(a).

Plaintiffs cause of action under 306(1)(d) is premised on the allegation that because California exempts various forms of commercial and industrial property from taxation the imposition of an ad valorem property tax on plaintiff constitutes discriminatory taxation and thus any taxation of plaintiffs must be enjoined. In response to this argument defendants will show either that the tax levied on plaintiffs' rail cars has no economic impact on any railroad or that any impact is *de minimus* and thus cannot constitute discriminatory taxation.

Further, in relation to both the § 306(1)(a) and § 306(1)(d) claims defendant will show that granting the relief sought by plaintiffs will not accomplish Congressional intent in that it will either have no impact at all on the financial resources of the railroad or only a *de minimus* impact.

STATEMENT OF FACTS

Defendant has found no reported decision which considers in detail plaintiffs' business of leasing railroad cars. Understanding that business and the relationship of these plaintiffs to railroads is critical to understanding defendant's motions.

Plaintiffs are all in the business of acquiring and leasing rail cars. Evdo 8:12; Schaffer 7:9-16; Dinsmore 4:17, 5:2.[1] They are not railroads. Keeney 1. Essentially all of the cars are then leased to non-railroad commercial companies. Dinsmore 4:23, 5:2; Schaffer 7:24, 8:6 (less than 5% leased to railroads); Evdo 8:2-12.

New Car Leases

The leasing process starts with a contact between the plaintiff/lessor and a potential lessee; the contact may be initiated by either party. Evdo 11:8-19; Schaffer 8:13-17. The lessee will identify the type of car needed and plaintiff will then calculate the amount to be charged and make an offer based on such calculation. Schaffer 8-12; Evdo 12; Dinsmore 5:16, 6:7. While price (i.e. lease payments) plays an important part in establishing the terms of a transaction the lessee will not acquire a car unless there is an economic need for it. Dinsmore 35:19, 36:1; Evdo 11:20-23. The lease price is determined by attempting to calculate the cost of ownership of the car over its life, which is normally 28-30 years. Schaffer 15:4-8; Evdo 15:16-18; Dinsmore 31:19, 32:1. An amount is added for profit and that total is used as a base figure in establishing the lease price that the plaintiff hopes to get. But the price eventually agreed on is negotiated by the parties and may be different than the price generated by the above described process. Dinsmore 6:14-18; Schaffer

1. References to depositions and declarations will be by the last name of the deponent or declarant as follows: Willard Keeney (Keeney); Thomas Gilligan (Gilligan); Brian R. Evdo (Evdo), ACF; Donald J. Schaffer (Schaffer), GATC; Stephen G. Dinsmore (Dinsmore), Union Tank. Copies of the depositions are filed herewith. The depositions taken were pursuant to a confidentiality agreement and will be filed directly with the court in sealed envelopes. Declarations of Willard Keeney (Keeney) and Michael Gilligan (Gilligan) are also filed.

13; Evdo 23:15-23.

Calculating the total cost of ownership requires adding three categories of value: (a) original cost, (b) general and administrative expenses (G&A), and (c) maintenance expenses. Categories (b) and (c) are estimated for the life of the car. Estimated G&A expenses include estimated ad valorem taxes for the life of the car Schaffer 10-16; Evdo 12-18; Dinsmore 5-11. The estimated ad valorem taxes are based on nationwide average. The Estimated taxes are a projected average based on a "standard ad valorem" determined by dividing past taxes by the total number of cars. Evdo 8:14-19; Schaffer 14:14-24, 20, 21:16, 22:3; Dinsmore 7-8, 9:3-5. Since rail cars move throughout the country it is impossible to know which state tax rates will be applied during different years. The projected tax rate thus may or may not equal California's tax rate in any year.

Taxes are estimated for a standard car as part of the G&A expenses in the same manner in which other G&A expensis are calculated. For example rent charges are equally apportioned among all the cars; taxes are similarly calculated by totaling all taxes paid on all cars, dividing by the number of cars and projecting that result over the anticipated life of the car. Dinsmore 13:19-21; Schaffer 21:16, 22:3. Projected taxes are thus not car specific.

The critical element in the process is not the amount of tax but where the economic burden eventually rests. In the short run the burden rests almost entirely on the lessor/shipper with only a very minimal impact on any railroad; in the long run it rests entirely on the lessor/shipper and not all on the railroad. Declaration of Thomas W. Gilligan, Declaration of Willard Keeney.

Railroad Charges for Transporting Material

After leasing a car the lessee uses it to store or

transport materials. Keeney 2-3. When the lessee ships material (or even an empty car) it must pay a fee to the railroad. Keeney 2. That fee can either be a negotiated rate between the lessee (the shipper) and the railroad or a tariff approved by the Interstate Commerce Commission (I.C.C). Keeney 3. The railroad and shipper negotiate a fee acceptable to both parties. Keeney 3. In recent years a negotiated fee has been used in virtually all shipments by lessees of these plaintiffs. Keeney 3.

The I.C.C. tariff is based on the assumption that the railroad is providing the rail car. When the shipper provides the rail car it is reimbursed by payment of a "mileage allowance" by the railroad. Actually the mileage allowance is first paid to the car owners (here, the plaintiffs) who then transfer it to the lessees/shippers pursuant to the lease agreement (normally as a set off against the lease payments due). Dinsmore 31:19, 32:1.

There is, in effect, a triangular trade. A car is leased to a commercial lessee which creates a payment obligation from the lessee to the lessor, the car is then used to transport material on the railroads which creates a payment obligation from the lessee to the railroad, but then, because the lessee's car is used a payment is made in the form of a mileage allowance, by the railroad to the lessor/owner of the car, and, finally, that mileage allowance is transferred to the lessee/shipper pursuant to provisions in the lease agreement.

Without consideration of the lease payment there is one circular payment of the freight charge from the shipper to the railroad followed by the mileage allowance from the railroad to the plaintiff/lessor which is then, in turn, paid to the shipper. None of these payments are a direct function of the payments due by the lessee to the lessor.

This process has been explained in detail at the inception of this argument so that the court will be able to have this in mind when considering the application of

the 4-R Act to defendant's arguments and the legislative history and purpose of the 4-R Act.

ARGUMENT

I.

THIS COURT IS NOT BOUND BY THE NINTH CIRCUIT ACF DECISION

In their Memorandum in support of their motion for preliminary injunction plaintiffs rely heavily on *ACF Industries v. Dept. of Revenue of State of Or.*, 961 F.2d 813 (9th Cir. 1992), (*ACF, Oregon*). At the inception of this argument it must be made absolutely clear that *ACF, Oregon* is not determinative of this motion. While normally a Ninth Circuit decision would be binding on this court that decision is not controlling as to defendants arguments because the Ninth Circuit: assumed one issue which was not raised on appeal (the critical standing issue); was not presented with an issued and thus didn't decide it (the distinction between these three plaintiffs and Trailer Train); and the parties stipulated to one issue to which this defendant does not stipulate (that plaintiffs' "property is 'transportation property'"). Each of these elements is absolutely essential to the Ninth Circuit decision and each is open to original decision by this Court.

These motions apply only to ACF Industries (ACF), General American Transportation Corporation (GATC) and Union Tank Company (Union Tank). While TTX Corporation (TTX, formerly Trailer Train) is also a party to this action this motion is not applicable to that

plaintiff.[2]

Defendant's Motion Presents An Unresolved Question In the Ninth Circuit

The fact that this action is brought against ACF, GATC and Union Tank (hereinafter sometimes referred to as "the three plaintiffs", "the plaintiffs" or "these plaintiffs") rather than a railroad or Trailer Train presents a standing issue. In *ACF, Oregon*, the Ninth Circuit held that because Oregon exempted certain "tangible personal property" from taxation while taxing of all of plaintiffs' personal property constituted discriminatory taxation in violation of § 306(1)(d).[3] But footnote two of that decision notes that while the standing issue had been raised at the trial court level the appellant had abandoned that argument on appeal. The footnote states, "Although we have not specifically decided whether entities other than railroads have standing to challenge a state tax under § 306, we have considered such challenges without discussing the standing question. [Citations] In this case, we agree with the District Court that the Carlines have standing." *Id.* at 817-818. Since the issue had been abandoned on appeal any ruling on that issue is not necessary to the decision and is, perforce, dictum.

To the extent *ACF, Oregon* refers to previous

2. As defendant will illustrate the exclusion of Trailer Train renders inapplicable those decisions which have found Trailer Train (and its subsidiaries Railgon and Railbox) properly subject to section 306. While no railroads are parties to this action it is worthy of note that cases dealing with application of section 306 to railroads also are not necessarily applicable to these plaintiffs.

3. All of the three plaintiffs in this action were plaintiffs in the Oregon action in addition to General Electric Railcar Services Corporation, Pullman Leasing Company, Railbox Company, Railgon Company and Trailer Train Company.

decisions which have assumed the issue the pertinent law is set forth in *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89, 119 (1983)

> These cases thus did not directly confront the question before us. "[W]hen questions of jurisdiction have been passed on in prior decisions *sub silentio*, this Court has never considered itself bound when a subsequent case finally brings the jurisdictional issue before us." *Hagans v. Lavine*, 415 U.S. 528, 533, n. 5, 94 S.Ct. 1372, 1377 n. 5, 39 L.Ed.2d 577 (1974). We therefore view the question as an open one.

Footnote omitted.

It is indeed fortunate that this court is not bound by the dictum in that footnote as it then goes on to set forth a seriously flawed analysis of the impact of a tax on "Carlines" as it is eventually reflected in an impact on railroads. "Without a doubt, if Oregon's tax exemption scheme discriminates against the Carlines, it also 'results' in discrimination against the railroads." The decision does not take into account in any fashion, at any point the striking differences between these three plaintiffs and Trailer Train.

Footnote two further states "Reaching that very conclusion the Eighth and Eleventh Circuits have emphasized 'the close relationship between [the Carlines] and common carriers, and [have] held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d). In any event, the required analysis under 306(1)(d) could show an effect on private carlines which directly and integrally impacts on common carriers by railroad." Emphases added. The interior quote is from the *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1573 (11th Cir. 1987). But, the actual quote is "the close relationship between Trailer Train and

common carriers . . ." 830 F.2d at 1573. Emphasis added. As defendant will show in detail, infra, there is a world of difference between the relationship of Trailer Train and railroads and the relationship of these three plaintiffs and railroads. There is no evidence in the *ACF, Oregon* that the court had before it any factual evidence regarding this striking difference. Defendant will show the court that this subtle segueing of "carlines" for Trailer Train, has, without supporting evidence, introduced a pernicious doctrine into the entire line of § 306 cases which has distorted application of that section so that it no longer reflects Congressional intent.[4]

II.

THE STANDING ISSUE IS UNRESOLVED IN OTHER CIRCUITS

Not only is this an open question in the Ninth Circuit this standing question also has not been decided in any Circuit in relation to these plaintiffs.

Defendant recognizes that *General American Transp. v. Louisiana Tax Com'n*, 680 F.2d 400 (5th Cir. 1982), does find § 306(1)(a) applicable to GATC. But it is a very narrowly decided case. "The only issue before the Court is whether privately owned specialty cars are equipment 'owned or used' by rail carriers regulated by the ICC." *Id.* at 402. The decision holds that such cars are rail transportation property and simply concludes from that, "it makes little sense to deny private car companies

4. It is noteworthy that all of the cases cited in footnote two in support of the argument that "Section 306(1)(d) prohibits any tax that results in discriminatory treatment of a common carrier by a railroad, even if the effect is indirect." are Trailer Train cases. Emphasis added. In each of these cases only Trailer Train, Railgon and Railbox were the plaintiffs.

the same protection against discriminatory taxation already provided to other railroad transportation property." *Id.* at 403.[5]

This result was arrived at in a two page decision with no meaningful analysis of the facts of the car leasing business. This decision was not cited in *ACF, Oregon* and with the exception of three other citations it has sunk into its very well deserved obscurity. It was cited in *Fruit Growers Exp. Co. v. Norberg*, 471 A.2d 628 (1984), for the proposition that "Interstate rail carriers are obligated to provide facilities and equipment that are reasonably necessary to furnish safe and adequate service on American railroads." *Id.* at 631. The decision was further cited in *Dept. of Revenue, State of Fla. v. Trailer Train*, 830 F.2d 1567, 1573 (11th Cir. 1987), where the court noted, "The case did not reach the issue of whether the taxation of such cars was to be considered in deciding whether there is discrimination under § 306(1)(d)." *Id.* at 1573 fn. 13. Finally, the decision was cited in yet another Trailer Train case, *Trailer Train Co. v. State Bd. of Equalization*, 710 F.2d 468, 472 (8th Cir. 1983), as a "see generally" citation. Both of these citations to Trailer Train cases and the decision itself fail to note the distinction between the three plaintiffs that are the subject of this motion and Trailer Train. That distinction will be developed in detail, infra.

As noted the only issue decided by *General American* was whether or not GATC's cars are owned or used by rail carriers; it did not consider GATC's standing to bring the action. Of equal importance, the decision recognizes that, "[t]he legislative purpose of the act is to prevent a state from unfairly burdening interstate carriers regulated by the ICC." *Id.* at 403. Footnote omitted. But the decision deals not at all with this critical question

5. The decision fails to note the source of this "protection . . . already provided to other rail transportation property."

it presents: does a tax on any of these plaintiffs burden "interstate carriers regulated by the ICC". While the ICC definitions relied on may be helpful in placing plaintiffs' rail cars within the literal language of § 306(1)(a) they do nothing regarding § 306(1)(d) and nothing in relation to the basic issue the decision itself sets forth; does a tax on plaintiffs "burden" any entity protected by § 306.

General American does not consider the standing issue, has never been cited in a Ninth Circuit decision, did not consider the factual relationship between plaintiffs and railroads is limited to § 306(1)(a) and is not binding on this Court.

III.

PLAINTIFFS STANDING MUST BE BASED ON ONLY THE 4-R ACT

An analysis of plaintiffs' claim must start with the Tax Anti-Injunction Act. That act (28 U.S.C. 1340) provides "The district courts shall not enjoin, suspend or restrain the assessment, levy or collection of any tax under State law where a plain, speedy and efficient remedy may be had in the courts of such State." This is a jurisdictional section which limits other grants of jurisdiction *May v. Supreme Court of State of Colorado*, 508 F.2d 136, 137 (10 Cir. 1974). Plaintiff relies on 28 U.S.C. 1337 and 28 U.S.C. 1331 as bases for its alleged jurisdiction but because this action does seek "to enjoin, suspend and restrain" collection of California taxes the jurisdiction granted by those sections is eliminated by the Tax Anti-Injunction Act.

Plaintiffs must then rely on the 4-R Act as an exception to 28 U.S.C. 1341, if they are to establish this court's jurisdiction.

IV.

§ 306 IS TO BE CONSTRUED BY APPLICATIONS OF MAXIMS OF STATUTORY CONSTRUCTION, REFERENCE TO LEGISLATIVE HISTORY AND RELEVANT CASE LAW

Statutory construction is assisted by reference to three sources, maxims of statutory construction, legislative history, and case law. While various aspects of § 306 have been the subject of a great deal of each of these three factors its application to carlines such as these plaintiffs is scant at best.

Maxims of Statutory Construction

While maxims of statutory construction abound and seemingly contradictory maxims exist there is a general consensus that the most fundamental maxim is that a statute is to be construed in such a manner as to give effect to Congressional intent in adopting the statute. This maxim was applied in one of the § 306 consolidated cases before this court. In *Trailer Train Co. v. State Bd. of Equalization*, 697 F.2d 860, 865 (9th Cir. 1983), cert. denied 464 U.S. 846, where the court stated, "In interpreting a statute, the court's objective should be to ascertain congressional intent and give effect to legislative will. [citations]." In attempting to divine Congressional intent "A court may look beyond the express language of a statue where a literal interpretation thwarts the purpose of the overall statutory scheme or leads to an absurd result [citations]." *Id.* at 866. Both of these maxims are

pertinent to and supportive of defendants arguments.[6]

Congressional intent can be garnered either from the words of the statue or from its legislative history. Both have been the subject of reported Congressional hearing and case law interpreting the language of the statue and will be considered infra.

Legislative History

It is clear from the legislative history that not only was there a Congressional intent that any "discriminatory" taxation must impact on the railroads it is also clear that Congress was concerned with elimination of discriminatory treatment that had a financial impact on railroads. Even from the early stages of development of the 4-R Act this was apparent. From the beginning the intention was to provide protection to railroads "Procedurally it [§ 306] would provide a remedy in the Federal courts for common and contract carriers against the collection of the excessive portion of any tax based upon such unlawful assessment of rate." S. Rept. No. 91-630, 91st Cong. 1st Sess. (1969). Quoted in *Atchison, T. & S.F. Ry. Co. v. Lennen*, 640 F.2d 255, 299 (10 Cir. 1981). Emphasis added.

In the hearings before the Committee on Commerce United States Senate on July 16, 17 and 18 of 1975, William T. Colemen, Jr., Secretary of the Department of Transportation testified, "I want to stress that all the provisions of the bill, not just the loan guarantee section, will provide financial resources to the railroads. This is true of the pricing flexibility, section and other sections, such as the prohibition against discriminatory State taxation. The latter itself will save the railroads about 50 million dollars a year." *Id.* at 620.

6. This court also has applied the congressional intent maxim to construction of § 306(1)(d). Nat. R.R. Pass Corp. v. Cal. Bd. of Equalization 652 F.Supp. 923, 926 (N.D. Cal. 1986).

"Congress identified inadequate financial resources available for the improvement and modernization of rail facilities as one of the major problems facing the railroads." S.Rept. No. 94-499, 94th Cong., 2d Sess. (1976), reprinted 1976 U.S. Code Cong. & Ad. News 1420.

Case Law

In addition to the legislative history several courts have had reason to offer explanations which further clarify Congressional intent in enacting § 306. In *Nat. R.R. Pass. Corp. v. Cal. Bd. of Equalization*, 652 F.Supp. 923, 927 (N.D. Cal. 1986) this court, per Judge Legge, stated, "As part of this revitalization, Congress included § 11503 [§ 306] specifically to remedy discriminatory taxation against railroads and to ease the tax burden on rail carriers." [Citation] Clearly this court thought was a tax burden on railroads was the object of Congressional action.[7] In *Chesapeake and Ohio Ry. Co. v. Rose*, 651 F.Supp. 1463 at 1465 (1985 S.D.W.Va), the court stated, "A connection between inadequate financial resources and discriminatory taxation was discovered." One goal of the 4-R Act was to revitalize the railroad industry by assisting the industry to become competitive in the capital markets. *Id.* at 1465. In *Ogilvie v. State Bd. of Equalization*, 657 F.2d 204, 207 (8th Cir. 1981) the court stated, "The purpose of the legislation was to remedy discriminatory taxation against railroads."

7. This decision is an interesting example of the difficulty in relying on constructions of legislative intent. Following the above quote the court stated, "For these reasons, the court concludes that the prohibition of section 11503(b)(4) [section 306(1)(d)] does not require a showing of actual or quantifiable competition among the tax entities." Id. at 927. On the other hand in Kansas City Southern Ry. Co. v. McNamara 817 F.2d 368 at 374 (5th Cir. 1987), the court states "Rather the point was to put the railroads back on an even footing with other forms of transportation." Footnote omitted.

All the decisions construing § 306 make it clear in one way or another that the concern is with taxes imposed upon railroads and that the concern exists because draining money away from railroads by what the 4-Act deems to be improper forms of taxation creates a financial burden on the railroads lowering their income and making it more difficult for them to have access to capital markets for financing. The discrimination condemned by § 306 is not simply different treatment of railroads from other tax payers but a differing treatment that impacts the railroad in a financial manner.

V.

BECAUSE THESE PLAINTIFF'S ARE CLEARLY DISTINGUISHABLE FROM TRAILER TRAIN THE CASES AND PRINCIPLES RELIED UPON IN DETERMINING THAT TRAILER TRAIN WAS PROTECTED BY § 306 ARE NOT APPLICABLE

§ 306 Is Applicable to Trailer Train Only Because of Special Aspects Of That Company

The decision rejects this courts prior reliance on the fact that neither Trailer Train nor Railbox is a "common carrier by railroad" then goes on to hold, "Section 306(1)(d) provides that a state may not impose any [sic] tax which 'results in discriminatory treatment of a common carrier by railroad.' Emphasis added. The district court have properly recognized that because of the close relationship between the Carlines and common carriers by railroad, tax discrimination against Trailer Train and Railbox results in discriminatory treatment of common

carriers by railroad." Last emphasis in original. *Id.* at 471. Thus the Eighth Circuit decision recognizes that it is an ultimate financial impact on the railroads that is the *sine qua non* of a violation of § 306. The court determined that an improper tax on Trailer Train could constitute a violation of § 306 because, and only because of "the close relationship between the Carlines and common carriers by railroad . . ." Trailer Train was formed, owned and operated for the benefit of railroads. It was required to charge the lowest possible rate to the railroads using its cars.

Trailer Train (including Railbox and Railgon) is a unique company with special aspects which led the courts to determine that even though it was not a common carrier it was protected by § 306. Section 306(1)(d), on its face, applies only to common carriers and not Trailer Train.[8/] But for such a deviation from the literal language of 306(1)(d) Trailer Train would not have received the benefits of the protection of that section. The deviation from § 306(1)(d) was based on the "close relationship" between Trailer Train and railroads. *Trailer Train Co. v. State Bd. Of Equalization*, 710 F.2d 468, 471 (8th Cir. 1963). Accord: *Dept. of Revenue State of Fla. v. Trailer Train*, 830 F.2d 1567, 1573 (11th Cir. 1987) ("We adopt the reasoning in the above mentioned Eighth Circuit case which referred to the close relationship between Trailer Train and common carriers and held that the tax need not be directly imposed on a common carrier in order to be covered by § 306(1)(d)." Emphasis added.

Trailer Train, (710 F.2d 768) held that exempting personal property of other commercial industrial tax

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8. The courts chose not to follow the literal language of the statute. In another context the Ninth Circuit "rejected the literal reading of § 11503 [§ 306] as being inconsistent with congressional intent . . ." Trailer Train (697 F.2d at 866), supra.

payers from taxation while not doing so for Trailer Train violated 306(1)(d), but, it is critical to note, it did so only after holding that Trailer Train was subject to 306(1)(d) because of the "close relationship" between Trailer Train and the railroads. Without that close relationship 306(1)(d) would not have applied to Trailer Train and thus the exemption of personal property from taxation would have created no cause of action in Trailer Train.

<u>These Plaintiffs Are Clearly Distinguishable From Trailer Train And Its "Close Relationship" To Common Carriers</u>

As the Statement of Facts reveals these plaintiffs are dramatically different from Trailer Train in relation to two crucial aspects of the "close relationship" between Trailer Train and common carriers. Neither the first nor the third of the four factors listed in *Trailer Train*, (710 F.2d 468) exist in relation to these plaintiffs and those factors are absolutely essential in establishing standing.

These plaintiffs are not "owned by most of the major railroad systems in the United States" and they do not "furnish cars at the lowest possible rates."[9/] The combination of the first and third elements of the "close relationship" are of controlling legal significance. Trailer Train does not attempt to maximize its profits. These plaintiffs all attempt to maximize their profits.

Further, because Trailer Train was owned by the railroads if it did make a profit that profit was returned to

9. As will become apparent in the discussion of the standing issue the first and third elements are critical while the second and fourth are of no particular significance. It is however noteworthy that these plaintiffs also differ from Trailer Train in Trailer Train's use of "the pooling arrangement". Plaintiffs' cars are not provided to railroads through a "pooling arrangement".

the railroads in the form of a dividend.[10/] In contrast, none of these plaintiffs are owned by railroads and thus any profits they earn are not distributed to railroads.

These two distinctions are critical to application of § 306(1)(d). If this court ultimately decides that Trailer Train is protected by 306(1)(d) and that the exemptions alleged by Trailer Train do constitute a violation of that section then it is reasonable to conclude that the financial benefits gained from such a ruling will be passed on to common carriers either in the form of lower rental rates or in the form of dividends from Trailer Train to its common carrier owners. But if this court should enjoin the collection of taxes on the property of these plaintiffs there is no reason to believe that the financial benefits gained will enure to the benefit of any railroads. If the tax exemption increases the income of these plaintiffs it will either be retained by the plaintiffs or passed on to their non common carrier owners. If, for whatever reason, the financial gain from the reduced taxes is passed on it will be to the lessees of these plaintiffs and not to common carriers. Thus, for example, if a plaintiff lowers it monthly rental to Dow Chemical because of the decreased taxes the benefit will accrue to Dow Chemical rather than to a railroad.

It is particularly important to note that in relation to cars already under lease at the time of any court injunction the benefits will accrue to a plaintiff. If a car has been leased for five years the terms of the lease are set and a change in taxes will not affect the amount of payments due from the lessee. Dinsmore 11:2-13; Schaffer 33. In relation to those cars under lease all of the benefits will constitute a windfall profit to a non common carrier plaintiff.

10. As this court is aware from the prior trial in this matter on at least two occasions Trailer Train did pay a dividend to its owners.

How The "Close Relationship" Test Was Improperly Expanded

Through a series of judicial decisions these plaintiffs acquired an apparent identity with Trailer Train at least in so far as application of 306(1)(a) was in issue.

Much of this process of equating these plaintiffs with Trailer Train, arose from the use of "carlines" to identify the parties in an action. Originally "carlines" was used to describe Trailer Train, Railgon and Railbox in *Trailer Train Co. v. State Bd. of Equalization*, *supra* 710 F.2d 468, 469 (8th Cir. 1983), the court stated, "Trailer Train and Railbox (hereafter collectively referred to as the 'Carlines') . . ." The use of Carlines to describe ACF and ten other companies appears shortly after in *ACF Industries, Inc. v. State of Ariz.* 714 F.2d 93, 94 (9th Cir. 1983) ("Eleven companies that own and lease railroad cars to operating carriers (the 'Carlines') . . .")[11/]

Use of "Carlines" to describe not only Trailer Train, Railgon and Railbox, but also to include these three plaintiffs appeared in this Court's decision in *ACF Industries v. Cal. State Bd. of Equalization*, 653 F.Supp. 390, 391 (N.D. Cal. 1986), "Plaintiffs are railroad car companies ('Carlines') . . ." and has consistently been used since that time to describe all the plaintiffs in this action as though they were fungible. This transmutation of "carlines" from Trailer Train to Trailer Train and ACF, GATC and Union Tank is carried over into the Ninth Circuit decision in *ACF, Oregon*. While ACF was the named appellant others included GATC, Trailer Train and Union Tank. The Ninth Circuit stated, "Appellants

11. ACF does not "lease railroad cars to operating carriers" to any meaningful extent and nor do the other plaintiffs who are presumptively part of the eleven carriers. It is precisely this type of loose analysis which has led to the confusion regarding the identity of Trailer Train and these plaintiffs.

(collectively, the 'Carlines') . . ." *id.* at 815. Incorrect use of this title has been carried over by these plaintiffs into the Complaint (paragraph 17); the Preliminary Injunction pleadings "plaintiffs . . . (referred to collectively as the "carlines"). Plaintiffs' Memorandum In Support of Motion for Preliminary Injunction 2:2-5.

It may well be that a rose is a rose is a rose, but a Carline (Trailer Train) is not a Carline (ACF), a Carline (GATC), at Carline (Union Tank). A close reading of the *Trailer Train*, (710 F.2d 468) decision is crucial to an understanding of this problem. The state in that case had argued that because neither Trailer Train nor Railbox was a common carrier 306(1)(d) did not apply to them. In response the decision relied on the provision in 306(1)(d) that "any [sic] tax which 'results in discriminatory treatment of a common carrier by railroad.' Emphasis added." *Id.* at 471. Was prohibited by 306(1)(d). Thus, the limitation of 306(1)(d) to common carriers could be avoided if, but only if it could be proven that the tax "results" in discrimination against a common carrier.

The decisions explanation as to why that was true in relation to Trailer Train is the origin of the confusion between Trailer Train and these plaintiffs. The confusion is initiated at page 741 where the court, in one sentence, refers to both Carlines and Trailer Train, "The district court here properly recognizes that because of the close relationship between carlines and common carriers by railroad, tax discrimination against Trailer Train and Railbox results in discriminatory treatment of common carriers by railroad."

In short, those cases which have expanded on the concept that Trailer Train is protected by § 306 because of its "close relationship" to railroads are simply not applicable to these plaintiffs. These plaintiffs are not "carlines" in the sense of those cases, they have no close relationship to railroads, any tax injury done to them is not passed on to the railroad and any relief given under

the 4-R Act does not benefit railroads.

VI.

PLAINTIFFS MUST, AND CANNOT, PROVE THE ELEMENTS NECESSARY TO ESTABLISH THEIR STANDING TO BRING THIS ACTION AND ACCORDINGLY THIS COURT IS WITHOUT JURISDICTION TO HEAR IT

In *Lujan v. Defenders of Wildlife*, __ U.S. __, 112 S.Ct. 2130 (1992) (copy attached.) the Supreme Court set forth the standards to be satisfied before a District Court can have jurisdiction over a matter.

Starting with the Constitutional principal that federal courts have judicial power only in relation to cases and controversies the Supreme Court held that there can be no case or controversy unless the plaintiff has "standing" to bring the action. *Id.* at 2135 - 2136. The court set forth three elements of standing. Plaintiff has the burden of proving each and every element. *Id.* at 2136. Plaintiffs must prove (1) that they have suffered an injury in fact, the invasion of a legally protected interest which is concrete and particularized. (2) that there was a causal relationship between the injury and the conduct complained of and (3) that it is likely that a favorable decision will redress the injury. *Id.* at 2136.

Defendant's Summary Judgment Motion - Injury to a Legally Protected Interest

Defendant's Summary Judgment Motion puts in issue the facts necessary to establish the court's jurisdiction. Plaintiff's burden in response to the Summary Judgment Motion is set forth at *Lujan* page 2137

> "In response to a summary judgment motion however, the plaintiff can no longer rest on such 'mere allegations,' but must 'set forth' by affidavit or other evidence 'specific facts,' F.R.C.P. 56(e), which for purpose of the summary judgment motion will be taken to be true."[12]

Plaintiff's 306(1)(d) claim is based simply and solely upon an allegedly discriminatory tax created by the existence of specified exemptions from California's property tax laws. Complaint paragraphs 20-26. Plaintiffs do not allege that there is an economic or financial impact upon them caused by that exemption. That is, plaintiffs do not even allege that their property taxes are higher because of any exemptions created by California laws. To satisfy the first requirement of standing plaintiffs must prove an actual injury to a legally protected interest as a result of the exemptions.

At this point the Court's subject matter jurisdiction must be considered in tandem with plaintiff's standing. In relation to totally enjoining collection of state taxes this Court's jurisdiction extends only to those taxes violative of § 306(1)(d). That is the only "legally protected interest" at stake. Accordingly, plaintiffs must prove that they will suffer not just an injury but an injury--an invasion of a legally protected interest--where the interest is created by § 306(1)(d). That is, plaintiffs must prove "by affidavit or other evidence" (*Lujan* 112 S.Ct. at 2137) that (a) they are common carriers by railroad or (b) are sufficiently close to such a common carrier by railroad that any economic injury to them is also an injury to a railroad.

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12. If while plaintiff's evidence must be accepted as true insofar as it is adverse to defendant's summary judgment motion based on lack of standing/jurisdiction it need not be accepted as true to the extent it responds to defendants normal summary judgment motion.

Causal Relationship

Plaintiffs will face an even more formidable obstacle in any attempt to prove the second element. First, because plaintiffs can not prove an injury they certainly cannot prove a causal relationship between a non-existent injury and the existence of the challenged exemptions. Further, if plaintiffs could prove that their taxes had increased at some point in time they would have to establish a causal relationship between such increase and the granting of tax exemptions to other property. It is particularly noteworthy that the Supreme Court has specifically held that plaintiffs have the burden of proving the causal relationship between the injury and the conduct of which they complain. *Lujan* 112 S.Ct. at 2136. Whether plaintiffs sue under § 306(1)(a) or 306(1)(d) they have the burden of proving the causal relationship between the existence of improper assessment exemptions and the alleged injury.

Redress of Injury

The third requirement, that a favorable decision will redress the injury is not only an essential element of standing but it is also a perfect vehicle for considering a critical element of this case. If there is an injury to a railroad it will not be redressed by enjoinging collection of taxes from these plaintiffs

Enjoining collection of any ad valorem taxes on plaintiffs' cars would produce an unwarranted windfall for plaintiffs without accomplishing congressional intent in adopting 306(1)(d).

In its most direct form this can be illustrated by consideration of the effect of such an injunction on cars under lease. When a plaintiff leases a new car it includes in the charges to the lessee an element intended to recover estimated ad valorem taxes. That charge remains

fixed for the life of the lease; any decrease in estimated costs (e.g. maintenance costs, ad valorem taxes) accrues to the benefit of the plaintiff/lessor. If this court enjoins collection ad valorem taxes on plaintiffs' cars plaintiffs will no longer have to pay them but will still collect the portion of the lease payments included to recoup tax payments. Where plaintiffs have been merely conduits to pass the taxes on to the lessee they now would become a repository for an unearned gain.

Was this the intent of Congress in passing the 4-R Act? Did Congress intend to deprive states of tax monies so that an unrelated non common carrier would gain an unearned profit?

Beyond the fact that plaintiffs should not so profit there is the additional factor that railroads, the intended 4-R beneficiaries, receive no benefit from the injunction. As defendant has illustrated neither the imposition nor the removal of an ad valorem tax on these plaintiffs affects railroads. Railroads do not benefit financially from an order enjoining collection of ad valorem taxes on these plaintiffs' cars. Since the purpose of § 306 was to aid the railroads financially the Congressional purpose cannot be achieved by enjoining collection of taxes on cars owned by these plaintiffs.

This same principle applies to plaintiffs attempt to rely on 306(1)(a). For the same reasons that enjoining collection of all ad valorem taxes would create an unjustified windfall for plaintiffs without accomplishing Congressional intent or financially benefiting railroads, enjoining collection of part of the taxes would benefit plaintiffs to the extent of the enjoined taxes without benefiting railroads to the same, or any, extent.

Plaintiffs thus do not satisfy the third *Lujan* standing requirement to bring an action under § 306(1)(d) or 306(1)(a). In fact, plaintiffs failed each and every *Lujan* test; there is no injury to a legally protected interest because plaintiffs are granted no such interest by § 306;

there is no causal relationship because there is no injury and to the extent there is a tax which appears to possibly create an injury there is no causal relationship between the tax and the alleged injury; finally granting plaintiffs the relief sought would not redress any injury to the railroads, the intended beneficiaries of § 306.

VII.

DISCRIMINATION HAS A WELL UNDERSTOOD MEANING AND IT MUST BE PRESUMED CONGRESS UNDERSTOOD AND USED THAT MEANING

The term "discrimination" and the phrase "discriminatory treatment of a common carrier by railroad subject to this part" in § 306(1)(d) are not defined anywhere in § 306. However, "discrimination" has an ordinary meaning which is well understood and followed within the practice of law, including in relation to the enactment of § 306(1)(d) and the 4-R Act in general. (*Richmond, Fredericksburg & Potomac Railroad Co. v. Dept. of Taxation, Commonwealth of Virginia* (4th Cir. 1985) 762 F.2d 375, 380-381 [the Virginia corporate net income tax has no undue financial impact on and therefore does not discriminate against railroads in violation of § 306(1)(d)], *citing, Baker v. California Land Title Co.* (C.D.Cal. 1972) 349 F.Supp. 235, 238, *aff'd,* (9th Cir. 1974) 507 F.2d 895, *cert.den.,* (1975) 422 U.S. 1046; and see, *Chesapeake and Ohio Ry. Co. v. Rose* (S.D.W.Va. 1985.) 651 F.Supp. 1463, 1465 ["The 4-R Act was the congressional solution for state tax discrimination against railroads which had imposed financial burdens upon the railroad industry. Such taxation was determined to be an impermissible burden on interstate commerce"], *aff'd* 809

F.2d 785.)

Thus, in order to show discriminatory treatment under § 306(1)(d), there must some distinction or tax in favor of others and against a common carrier by railroad, which the courts have interpreted to mean that there must be an undue impact or burden on a railroad. (*Richmond, Fredericksburg & Potomac Railroad Co., supra,* 762 F.2d at 380-381; *Department of Revenue, State of Florida v. Trailer Train* (11th Cir. 1987) 830 F.2d 1567, 1573, 1574 fn. 15 [disparate impact]; and *Kansas City So. Ry. Co. v. McNamara* (5th Cir. 1987) 817 F.2d 368, 374 [the effect of the action must be compared to the effect on others].)

Moreover, in all cases involving equal protection and Commerce Clause issues, "discrimination" means the same thing: unequal treatment that is legally prohibited because of an undue burden, impact, or deprivation of a right. The following cases are illustrative of the fact that in every context in which discrimination is found in the law, there is such an burden, impact, or deprivation upon the class or group at issue:

Massachusetts Bd. of Retirement v. Murgia (1976) 427 U.S. 307, 314-317 (Retirement statute does not impose a penalty upon a class defined as the aged and therefore does not constitute discrimination in violation of equal protection of the laws).

Mississippi University for Women v. Hogan (1982) 458 U.S. 718, 728-731 (A gender-based classification favoring one sex may be justified if it intentionally and directly assists members of the sex that is disproportionately burdened. However, such an otherwise discriminatory classification is justified only if members of the gender benefitted by the classification actually suffer a disadvantage related to the classification, and the policy of excluding males from the School of Nursing, rather than compensating for a discriminatory barrier faced by women, tends to

perpetuate the stereotyped view of nursing as exclusively a women's job).
Kramer v. Union Free School District No. 15 (1969) 395 U.S. 621, 626, 632-633 (Any unjustified discrimination in determining who may vote or participate in political affairs undermines the legitimacy of representative government, and statute at issue is not sufficiently tailored to limiting the franchise to those "primarily interested" in school affairs to justify the denial of the franchise to appellant and members of his class)

Trinova Corp. v. Michigan Dept. of Treasury (1991) 499 U.S. __, 111 S.Ct. 818, 835-836 (Under *Complete Auto* test regarding violations of the Commerce clause, Trinova could not point to any treatment on face of state value added tax statute that discriminates against out-of-state companies as opposed to those in-state, nor could Trinova point to any secondary sources that showed that tax statute was passed to "export tax burdens or import tax revenues".)

Gomez v. Perez (1973) 409 U.S. 535, 538 (There is no constitutionally sufficient justification for excluding illegitimate children from sharing equally with other children in a state's creation of a judicially enforceable right to obtain needed support from their natural fathers simply because the natural fathers are not married to their mothers and, for a state to do so, is an illogical, unjust, and invidious discrimination.)

Schweiker v. Wilson (1981) 450 U.S. 221, 230-234, 239 (In determining that statute excluding certain inmates of public institutions from receiving reduced amounts of SSI benefits was not discriminatory and thus did not violate said inmates rights to equal protection, the Court found 1) statute did not classify or make distinction between the mentally ill and a group

composed of nonmentally ill persons, but rather between residents in public institutions receiving Medicaid funds for their care and residents in such institutions not receiving said funds, and 2) to the extent that statute has indirect impact upon the mentally ill as a subset of publicly institutionalized persons, the record in this case did not support a contention that the mentally ill as a class are burdened disproportionately to any other class effected by the statutory classification.)

Skinner v. Oklahoma (1942) 316 U.S. 535, 541-542 ("When the law lays an unequal hand on those who have committed intrinsically the same quality of offense and sterilizes one and not the other, it has made as invidious a discrimination as if it had selected a particular race or nationality for oppressive treatment. *Yick Wo v. Hopkins, supra; Gaines v. Canada*, 305 U.S. 337. Sterilization of those who have thrice committed grand larceny, with immunity for those who are embezzlers, is a clear, pointed, unmistakable discrimination. . . . The equal protection clause would indeed be a formula of empty words if such conspicuously artificial lines could be drawn.")

The above cases make clear that, at the minimum, in order to prove discrimination under § 306(1)(d), or otherwise, one must show all of the following:

1) that he or she is a member of the class of persons possessing a particular legally or legislatively defined characteristic ["the protected class"],

2) that there is some law, act, or practice that causes disparate treatment of the protected class compared to others similarly situated with respect to the purpose of the law, act, or practice ["the classification"], and, most

importantly,

3) that, as the result of the classification, he or she has suffered an unfair or unreasonable burden, impact, or deprivation of a right.

In short, one must prove membership in a protected class subject to a classification that is improper because it results in an undue burden, impact, or deprivation of a right. (See *e.g., Cleburne v. Cleburne Living Center, Inc.* (1985) 473 U.S. 432, 447-450.) The fact that a protected class is subject to a classification, by itself, does not suffice to prove illegal discrimination; rather, there must an unequal and unreasonable burden, impact, or deprivation of a right of the protected class. (*Id.* at 446, and see *Mass. Bd. of Retirement v. Murgia, supra*, 427 U.S. at 314-317, and *Schweiker v. Wilson, supra*, 450 U.S. at 230-234, 239.)

In this case, it is clear that ACF, GATC, and Union Tank have not and cannot prove the first and third criteria necessary to establish discrimination under § 306(1)(d).[13/]

Section 306(1)(d) defines the protected class as "common carrier(s) by railroad subject to this part." There is no doubt that these plaintiffs are not common carriers by railroad. (*Trailer Train Co. v. State Board of Equalization* (N.D.Cal. 1982) 538 F.Supp. 509, 513.) Unlike the case of plaintiffs Trailer Train, Railbox and Railgon (discussed below), where one could argue otherwise, these carlines and the railroads do not have such a close relationship that the prohibition in § 306(1)(d) should apply to them.

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13. The Board also believes there is some question as to whether these plaintiffs can establish the second criterion, however the Board addresses only the first and third in this motion.

Once the Court finds that these carlines are not members of the protected class, it could stop its inquiry into whether there has been some discrimination in violation of § 306(1)(d). However, even if this Court were to find that these carlines are protected by the provisions of that section, the carlines must establish the third criteria necessary to prove discrimination. (See, *Chesapeake and Ohio Ry. Co. v. Rose, supra,* 651 F.Supp. at 1481 [Railroads have burden to prove the existence and extent of the alleged discrimination in violation of § 306(1)(d)].)

The question this Court must ask is: "What financial or other impact, burdens, and/or deprivations do these carline companies suffer from as the result of any allegedly excessive tax or tax exemption scheme in the State of California?" As discussed below, the Board submits that there are none.

VIII.

ALLEGED TAX DISCRIMINATION MUST BE MEASURED BY THE ULTIMATE ECONOMIC BURDEN OF THE TAX

If a state is charged with levying a discriminatory tax the legality of the tax is to be measured not against its legal incidence but by the ultimate resting place of the economic burden created by the tax. The Supreme Court has spoken many times on this subject in cases dealing with the federal government's immunity from State taxation. In *Washington v. United States,* 460 U.S. 536 (1982), the Court considered a sales tax on federal contractor and in doing so summarized its holdings from numerous cases. Several basic rules applicable to this case can be extracted from *Washington*, (1) "The important consideration, therefore, is not whether the state differentiates in determining what entity shall bear the

legal incidence of the tax, but whether the tax is discriminatory with regard to the economic burdens that result." *Id.* at 544. (2) It is not necessary to prove the transfer of the economic effect of the challenged tax, "The opportunity for the parties to allocate the economic burden of the tax among themselves was sufficient." *Id.* at 544. (Emphasis added.) (3) "[T]he economic burden of a tax imposed on the owner of non exempt property is ordinarily passed on to the lessee . . ." *Id.* at 543.

The Supreme Court reached the same result in *Memphis Bank & Trust Co. v. Garner*, 459 U.S. 392 (1982) in responding to an argument that a state tax discriminated against the United States. There the Court again looked for both the economic and the legal incidence of the tax in determining whether or not there had been discrimination. The decision looked to placement "of the burden" of the tax. *Id.* at 397.[14]

As argued these plaintiffs are not entitled to the protection of § 306 because they are neither common carriers by railroad nor sufficiently related to such common carriers. But even if it is to be determined that they are entitled to § 306 protection there is no violation of that section unless the economic burden of the tax rests on the plaintiffs. Clearly in the present case, as in *Washington*, there is the opportunity for plaintiffs to pass the economic burden of the allegedly discriminatory tax on to the lessees.

Defendant has gone beyond this test and has offered economic proof that the challenged taxes would be passed on to the lessees/shippers. These plaintiffs have suffered no economic damage as a result of the tax exemptions; to the extent they may have created an economic impact on plaintiffs that impact was passed on

14. Both of these decisions lend further support to defendant's argument that there can be no discriminatory tax without an impact or "burden" on the subject of the allegedly discriminatory tax.

to the shippers which are not protected by § 306. See generally the Gilligan declaration.

Since the ultimate resting place is, both by inference and economic testimony on an unprotected party there is no impact and thus no 306(1)(d) discrimination.

CONCLUSION

Defendant asks this Court to decide a question of first impression: are these plaintiffs entitled to the protection of § 306(1)(d). There are two critical elements presented, (a) there must be discrimination and (b) it must be against a railroad.

"Discrimination" requires action against a specified protected class; here the class has been legislatively defined, it is "common carrier by railroad" (i.e. railroads). These plaintiffs are not railroads and thus are not entitled to § 306(1)(d) protection. Nor can these plaintiffs take advantage of the expansion of § 306 created by the *Trailer Train* cases because they lack the critical elements of *Trailer Train* which made the expansion possible.

The second element of discrimination, impact on the protected party is also lacking. Because the protected class is railroads plaintiffs must prove an impact on railroad. Defendant has affirmatively shown that there is no meaningful impact on railroads caused by any tax imposed on plaintiffs' railroad cars. It necessarily follows that there will be no impact on railroads caused by the exemptions of which plaintiffs complain.

Plaintiffs are not members of the protected class and any tax on plaintiffs' cars does not affect the protected class. The legal result of those facts can be phrased in a number of legal theories any of which is sufficient to cause dismissal of plaintiffs' actions: (a) the motion to dismiss ont he merits can be granted for failure to state a cause of action (b) the summary judgment motion can be granted because plaintiffs lack standing under the *Lujan*

test (c) the motion for summary judgment can be granted on the merits of defendants arguments and supporting declarations (d) the preliminary injunction can be modified to strike the enjoining of the collection of all taxes because plaintiffs are not likely to prevail on the merits.

All of these same arguments and conclusions apply to plaintiffs' 306(1)(a) claim. An improper assessment and consequent higher taxes on these plaintiffs rail cars does not affect railroads and thus does not violate § 306(1)(a). Because any improper taxation of plaintiffs does not affect railroad defendant's motions must be granted as to both 306(1)(d) and 306(1)(a) which means, in effect, to § 306 in its entirety.

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